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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1197

NOLAN CARTER, JR., Trustee in Bankruptcy, - - - - - - - Petitioner,

versus

COMMERCIAL BANK OF MIDDLESBORO, KENTUCKY, - - - - - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. _____

NOLAN CARTER, JR., Trustee in Bankruptcy, - - - - - *Petitioner,*

v.

COMMERCIAL BANK OF MIDDLESBORO, KENTUCKY, - - - - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The Petitioner, Nolan Carter, Jr., Trustee in Bankruptcy, of the bankrupt estate of Cantrill Construction Company, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 24, 1969.

OPINION BELOW.

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Opinion of the District Court for the Eastern District of Kentucky is reported in 293 F. Supp. 129. The Opinion of the Referee in Bankruptcy appears in Appendix B.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 24, 1969, and this Petition for Certiorari was filed within 90 days of that date. This Court's Jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether a Security Agreement expires by operation of law, when an original note, for which it was given to secure the repayment of, is cancelled, and a new note is taken, providing for an increased rate of interest.

STATUTE INVOLVED.

The Statute involved is Kentucky Revised Statute 355.9-204(5):

> "(5) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment."

STATEMENT OF THE CASE.

On February 10, 1967, Cantrill Construction Company, Inc. (Cantrill), executed and delivered a note to Commercial Bank of Middlesboro, Kentucky (Commercial) in the amount of $30,310.00, payable within six months with interest thereon at the rate of six per cent per annum. On the same day, in order to secure

the repayment of the loan, Cantrill executed and delivered to Commercial a security agreement covering certain construction equipment. It provided in part, as follows:

> "Witnesseth: Whereas the Mortgagor is indebted to the Mortgagee in the sum of thirty thousand, three hundred ten dollars and no cents ($30,310.00), as evidenced by Mortgagor's promissory note of even date herewith, payable to Mortgagee within six (6) months after date.
>
> "Now, therefore, to secure the payment of the said indebtedness as evidenced by the aforesaid note, together with six per cent (6%) interest per annum thereon from the various maturity dates of payment provided in said note. . . ."

The security agreement made no provision for future advances, extensions or renewals of the obligation. At the end of the six (6) month period, Cantrill was unable to repay the loan. The original note was cancelled, in one form or another, a payment made on same reducing the indebtedness to $20,202.00; a new note was taken for the $20,202.00, payable in six (6) months, with interest at the rate of 7% per annum. On the new note the following words were typed upon its face, in the lower left-hand corner:

> Age 60:
> Coll on Back
> Renewal #1 Orig. Amt. 30,310. Orig date 2-10-'67.

On the reverse side on the new note was typed the following:

Collateral:

Rock Quarry Equipment
Aug. 10, 67 2275 7-20, 202.00
Jan. 29, 1968—1 P. M.

At the time the original note and security agreement were executed, Cantrill also executed and delivered a Financing Statement to the Bank covering certain construction equipment. The Financing Statement was properly recorded.

When the second note for $20,202.00 became due, Cantrill could not pay and shortly thereafter went into Bankruptcy.

The Commercial Bank of Middlesboro filed a Petition to Reclaim the collateral, alleging its security interest in the same. The Trustee objected upon the basis that the Bank's security lapsed by operation of law when the original note was cancelled, and the new note was taken. The Referee overruled the Petition for Reclamation of Commercial, and Commercial filed a Petition for Review of the Referee's Order in the United States District Court for the Eastern District of Kentucky. The District Court affirmed the Referee, stating in essence, that the security agreement showed on its face that it was given to secure the repayment of a note in the sum of $30,310.00 payable in six months, and as it did not purport to secure payment of any extensions or renewals of the note, it expired by operation of law. The District Court citing Safe Deposit Bank and Trust Co. v. Berman, 1st Cir. C. A. 393 F. 2d 401.

The Commercial Bank then appealed to the United States Circuit Court of Appeals for the Sixth Circuit. The Sixth Circuit reversed the decision of the United States District Court and stated in essence that the Berman case was inapposite, and that it was not necessary for the security agreement to provide for an extension or renewal of the indebtedness.

REASONS FOR GRANTING WRIT.

1. The Decision Below Conflicts in Principal With the Decision in the First Circuit Court of Appeals as to the Proper Application of Article 9-204(5) of the Uniform Commercial Code.

KRS 355-9-204(5) provides that "Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment."

A thorough research of all Code decisions reveals only one case similar to the one at bar, as having been decided and reported. In the case of Safe Deposit Bank and Trust Co. v. Berman, 393 F. 2d 401 (1968), the First Circuit established the rule of law, that under Section 9-204(5), a security agreement, which is limited to a specific note, may not be extended to subsequent notes by incorporation by reference in the subsequent notes.

The Sixth Circuit avoided Berman, by stating it was inapposite, because there had been additional loans made in Berman, and not in Cantrill. Granted, but, this has nothing to do with the application of the

principal laid down in Berman. Berman involved a "future advance." This case involves "other value." The same principal of law must apply to both situations.

In light of Berman, and the principal of law therein established, it is not possible to reconcile the two cases.

2. Overall National Importance of Issue.

This case involves one of the most important sections of Article 9, of the Uniform Commercial Code. The Code has now been adopted by forty-nine of our fifty States. It is now the Law of the Land insofar as commercial transactions are concerned.

Each day hundreds of millions of dollars are loaned by the various different financial institutions throughout the United States. This includes every one from the small rural banks to the United States Government, and its Agencies, such as the Small Business Administration. In order to secure their loans, these institutions take back security agreements covering certain described collateral. This case raises the question of what is required, if anything, in a security agreement, for the secured party to remain secured when a debt matures and the debtor cannot pay, and a new note is taken.

The Sixth Circuit held in essence, that even when a new note is taken, with an increase in interest, this does not create a new obligation, and as such is not "other value." The Sixth Circuit also held that security agreements did not need to provide for extensions or renewals of pre-existing obligations, and

that a security agreement, limited to the note it is given to secure the repayment of, may be extended to subsequent notes by incorporation by reference in the subsequent notes. This case simply asks—what is "other value," and if Berman is correct . . ., and the Sixth Circuit was correct, then how does one advise a client on how he is to secure his loans against future defaults, or renewals or extensions. If value is to be given its traditional meaning, then it should be anything given or received which is sufficient consideration to support a simple contract. The granting of additional time to repay a debt in exchange for a 1% increase in interest is prima facie valuable consideration—the giving of values. . . . But not so according to this case. The Referee in Bankruptcy and the United States District Court for the Eastern District both relied upon Berman in reaching their opinion. The Sixth Circuit said it was inapposite. This, within itself, indicates a high degree of doubt, or confusion as to just what is meant by "other value," and how it is to be interpreted. In view of the importance of this Section of the Code and its effect upon the many hundreds of millions of dollars outstanding on loans, and future loans, the issue should be clarified.

Finally, the correctness of the Decision below is open to serious question. The Code represents an entirely new approach to security transactions and the rule of construction should be adopted that the Code is plenary and exclusive except where the Legislature has clearly indicated otherwise, and quite frankly, I feel the Sixth Circuit has failed to do this.

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Sixth Circuit.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX

APPENDIX A.

OPINION AND JUDGMENT OF COURT OF APPEALS—Filed November 24, 1969.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In the Matter of

CANTRILL CONSTRUCTION COMPANY,
Bankrupt.

COMMERCIAL BANK OF MIDDLESBORO, KENTUCKY,
Appellant,

v.

NOLAN CARTER, JR., Trustee in Bankruptcy,
Appellee.

} APPEAL from United States District Court for the Eastern District of Kentucky.

Decided November 24, 1969.

Before WEICK and EDWARDS, Circuit Judges, and BROOKS,* District Judge.

WEICK, Circuit Judge. Commercial Bank of Middlesboro, Kentucky (Commercial) has appealed from a judgment of the District Court which affirmed an order of the

Referee in Bankruptcy denying its petition for reclamation of chattel property described in a security agreement.

The facts were stipulated. On February 10, 1967, Cantrill Construction Company (Cantrill) executed a note to Commercial in the amount of $30,310.00, payable within six months, with interest at six per cent per annum. On the same day, in order to secure payment of the indebtedness, Cantrill executed and delivered to Commercial a security agreement covering certain mining equipment described therein. A financing statement was filed in the appropriate recording offices in Kentucky and Commercial obtained a valid lien on the equipment. The financing statement contained no maturity date.

On August 8, 1967, Cantrill made a payment on the original note and executed and delivered to Commercial a renewal note for the balance of the indebtedness in the amount of $20,202.00, payable in six months, with interest at seven per cent per annum. Cantrill failed to pay the note when it became due, and Commercial repossessed part of the property described in the agreement.

Shortly after the default, Cantrill filed a voluntary petition in bankruptcy. Commercial filed with the Referee in Bankruptcy a petition for reclamation of the remainder of the property covered by the security agreement. The petition was denied by the Referee. On petition for review, the District Court affirmed for the reasons stated by the Referee in his opinion and order. We reverse.

The Referee stated the reasons for denying Commercial's petition succinctly:

> "The trustee's objection that the security agreement does not secure the renewal note dated August 8, 1967, presently held by the bank is well taken and

*The Honorable Henry L. Brooks, Chief Judge, United States District Court for the Western District of Kentucky, sitting by designation.

should be and hereby is sustained. The security agreement shows on its face that it was *to secure a note* in the amount of $30,310.00 payable within six months. It does not purport to secure payment of any extensions or renewals of the note, or future advances. The security agreement dated February 10, 1967, expired when the note dated February 10, 1967, was marked paid. Consequently at the date of bankruptcy, there was no agreement in effect conveying to Commercial Bank of Middlesboro, Kentucky, a security interest in any property of the bankrupt." App. at 27. (Emphasis added.)

In our opinion the Referee has misapprehended the effect of the security agreement which clearly provided:

"Witnesseth: Whereas, the mortgagor is indebted to the mortgagee in the sum of Thirty Thousand, Three Hundred Ten Dollars and no cents ($30,310.00), *as evidenced by mortgagor's promissory note* of even date herewith, payable to mortgagee within Six Months (6) months after date.

"Now, Therefore, *to secure the payment of said indebtedness* as evidenced by the aforesaid note, together with six per cent (6%) per annum interest thereon from the various maturity dates of payments provided in said note . . . ." App. at 7. (Emphasis added.)

The security agreement on its face secured the indebtedness. The note was merely evidence of the indebtedness. Even if the security agreement were not explicit in its language, it is hornbook law that a chattel "mortgage secures the debt, not merely the evidence of it . . ." 15 Am. Jur. 2d *Chattel Mortgages* § 196 (1964). It is not relevant to the instant case whether the original note was canceled. In order to determine whether Commercial still has its se-

curity, the first question which must be answered is whether the original obligation has been extinguished. The answer to this question depends on the intent of the parties when the note was renewed, *i.e.*, whether the renewal note was taken in payment and satisfaction of the indebtedness. Kentucky law governs.

In Kentucky, the rule is that a renewal note does not extinguish the original obligation unless there is a novation. *Porter* v. *Bedell*, 273 Ky. 296, 298 (1938). By definition a—

> ". . . novation is the substitution of a new obligation for an old one, with the intent to extinguish the old one, or the substitution of a new debtor for an old one, with the intent to release the latter, or the substitution of a new creditor, with the intent to transfer the rights of the old one to him." *Truscon Steel Co.* v. *Thirwell Elec. Co.*, 265 Ky. 414, 417 (1936).

Intent is the essential element. The burden of proving a novation was on the Trustee in Bankruptcy.

Turning to the note, it is clear that the parties to the transaction did not intend that the new note was to extinguish the original obligation for the note specifically recites that it is "Renewal No. 1 Orig. Amt. $30,310.00." It also recites the date of the original loan and refers to the collateral for that loan. It is difficult to imagine a clearer case than this. The parties' intention was only to extend the time for payment not to extinguish the obligation.

The fact that the interest rate was raised from 6% to 7% does not negate this conclusion. See *Amlung* v. *First Nat'l Bank of Louisville*, 411 S. W. 2d 465, 467 (Ky., 1967). Commercial certainly did not intend to give up its security. See *State Nat'l Bank of Frankfort* v. *Thompson*, 277 Ky. 527, 530 (1938). The Trustee in Bankruptcy can hardly claim there was a novation because he has stipulated:

"(4) On the 8th day of August, 1967 a payment was made on the original note and a renewal note was executed by Cantrill Construction Company to the Commercial Bank in the amount of Twenty Thousand Two Hundred Two Dollars ($20,202.00) bearing interest at the rate of seven (7) per cent per annum. There is a balance due from the Bankrupt on account of the above described transaction in the amount of Twenty Thousand Two Hundred Two Dollars ($20,202.00) with interest at seven (7) per cent from the 8th day of August, 1967."

Since there was no novation, the original obligation remains in full force.

The security interest is provided for in the Uniform Commercial Code which has been adopted by Kentucky.[1] In order to be effective, a security interest must be properly perfected.

Perfection is defined by K.R.S. § 355.9-303 (1), which provides:

"(1) A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in K.R.S. 355.9-302, 355.9-304, 355.9-305 and 355.9-306. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches."

K.R.S. § 355.9-204(1) provides:

"(1) A security interest cannot attach until there is agreement (subsection (3) of KRS 355.1-201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the

[1]Kentucky adopted the Uniform Commercial Code in 1962. K.R.S. Chap. 355.

events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching."

In addition K.R.S. § 355.9-302(1) provides:

"A financing statement must be filed to perfect all security interests except the following: . . . ."

None of the exceptions apply in the instant case.

Applying these rules to the facts of the instant case, there was an agreement between Commercial and the Bankrupt evidenced by the security agreement. Value was given in the form of a $30,310.00 loan. The debtor, Bankrupt, had rights in the collateral at all times. A financing statement was properly filed. The security interest of the Bank was perfected.

The Trustee argues, however, that there was no provision in the security agreement for a renewal or extension of the note and, because a security agreement is only effective according to its terms, § 355.9-201, the renewal note was not secured by the security agreement. This does not follow.

The Trustee relies on § 955.9-240(5), which provides:

"(5) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment."

He contends that the execution of the new note was a "future advance" or "other value" within the meaning of the Code and, therefore, had to be specifically included within the terms of the security agreement. He relies, as did the Referee in Bankruptcy, on the cases of *Safe Deposit Bank & Trust Co.* v. *Berman,* 393 F. 2d 401 (1st Cir. 1968), and *In Re Rivet,* 4 UCC Reporting Service 1087, E.D.Mich.,

Oct. 2, 1967, Bankruptcy No. 66-8387. Such reliance is misplaced. We note that *In Re Rivet* was overruled on rehearing (April 9, 1969).

The *Berman* case is inapposite. In that case a security agreement was executed to secure a specific debt. There was no provision for future advances. However, additional money was advanced. In affirming the finding of the Referee and the District Court that the bank had not established a lien on the property of the bankrupt to secure the subsequent obligation, the Court noted:

> "If security agreements which on their face served as collateral for specific loans could be converted into open-ended security arrangements for future liabilities by recitals in subsequent notes, much needless uncertainty would be introduced into modern commercial law. In effect, notes would take on the character of security agreements." 393 F. 2d at 404.

In the present case there was no "future advance" as in *Berman*. No new money was loaned to Cantrill. All that was done was to renew the evidence of the old indebtedness and extend the time of payment. If *Berman* is to apply, the renewal note would have to come within the concept of "other value" of § 355.9-204 (5). Had the new note been taken in payment and satisfaction of the indebtedness, then arguably there would have been "other value." In other words, a *new obligation* would have been created, just as a distinct obligation was created in *Berman* by the future advances. Section 355-9-204(5) allows security agreements to cover these future, distinct obligations so long as they are specifically set forth in the agreement. However, as we have discussed, there was no novation in this case. There was, therefore, no new obligation required by § 355.9-204(5) to be set forth in the security agreement. The original obligation remained in full force, and was, of course, covered

by the security agreement. It was not necessary for the security agreement to provide for an extension or renewal of the indebtedness.

Had a novation occurred, extinguishing the original obligation, the language of *Berman* would be particularly appropriate.

> "Certainly such equities as appellant can claim here would be unavailing as against an innocent third party who had extended credit on the basis of the assumption that the July 30, 1963 security agreement was no longer effective after payment of the note it purported to secure." 393 F. 2d at 404.

We are not here faced with the danger of converting the security agreement into an open-ended agreement which would take priority over unsuspecting future creditors. Potential creditors were put on notice of the existence of a security interest in the present case. A financing statement which contained no maturity date was filed in the appropriate recording offices. Because the financing statement is undated, it is effective for five years. K.R.S. § 355.9-403(2).

The policy of the Uniform Commercial Code is merely to put potential creditors on notice of possible security interests. The Official Comments to § 9-402 of the Uniform Commercial Code make this clear:

> "This Section adopts the system of 'notice filing' which has proved successful under the Uniform Trust Receipts Act. What is required to be filed is not, as under chattel mortgage and conditional sales acts, the security agreement itself, but only a simple notice which may be filed before the security interest attaches or thereafter. The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described. Further inquiry

from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-208 provides a statutory procedure under which the secured party, at the debtor's request, may be required to make disclosure. Notice filing has proved to be of great use in financing transactions involving inventory, accounts and chattel paper, since it obviates the necessity of refiling on each of a series of transactions in a continuing arrangement where the collateral changes from day to day. Where other types of collateral are involved, the alternative procedure of filing a signed copy of the security agreement may prove to be the simplest solution."

A potential creditor of the Bankrupt would have discovered the financing statement upon examining the records in the recording office. Further inquiry would have led him to the existence of the security agreement and the renewal note. He would have known, therefore, the true state of the Bankrupt's financial situation.

Commercial has a valid security interest in the mining equipment. That interest has been perfected and, therefore, takes priority over the claim of the Trustee in Bankruptcy. K.R.S. § 355.9-301(1)(b). There is no reason in this case to enhance the Bankrupt's estate with a "windfall." It was error for the District Court to affirm the Referee's denial of Commercial's petition for reclamation of the secured property.

We reverse and remand, with direction to grant the bank's petition for reclamation.

APPENDIX B.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
(LEXINGTON)

In the Matter of:

CANTRILL CONSTRUCTION COMPANY, INC.
(61-0518095)
Bankrupt.

In Bankruptcy
No. 68-4977

ORDER OF REFEREE IN BANKRUPTCY.

The trustee's objection that the security agreement does not secure the renewal note dated August 8, 1967, presently held by the bank is well taken and should be and hereby is sustained. The security agreement shows on its face that it was to secure a note in the amount of $30,310.00 payable within six months. It does not purport to secure payment of any extensions or renewals of the note, or future advances. The security agreement dated February 10, 1967, expired when the note dated February 10, 1967, was marked paid. Consequently at the date of bankruptcy, there was no agreement in effect conveying to Commercial Bank of Middlesboro, Kentucky, a security interest in any property of the bankrupt. Safe Deposit Bank & Trust Company v. Berman, C.A. 1, April 22, 1968, 393 F. 2d 401; In re Rivet, 4 USC Reporting Service 1087, E.D. Mich., Oct. 2, 1967, Bankruptcy No. 66-8387.

The petition of Commercial Bank of Middlesboro, Kentucky, for reclamation of construction equipment in which

the bank alleges it holds a security interest should be and hereby is overruled.

It Is Ordered that copies of this opinion and order be served by mail upon the parties shown below.

At Lexington, Kentucky, this September 11, 1968.

/s/ Joe Lee
Referee in Bankruptcy

Copies Served By Mail Upon:
Charles W. Rolph,
Attorney for Trustee.

Glenn W. Denham,
Attorney for Commercial Bank of
Middlesboro, Kentucky.

E. David Marshall,
Attorney for Bankrupt.

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No. 1197

NOLAN CARTER, JR., Trustee in Bankruptcy, Petitioner,

versus

COMMERCIAL BANK OF MIDDLESBORO, KENTUCKY, - - - - - - Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1197

NOLAN CARTER, JR., Trustee in Bankruptcy, *Petitioner*,

v.

COMMERCIAL BANK OF MIDDLESBORO, KENTUCKY, - - - - - - - *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinions below are as stated in the Petition for Writ of Certiorari filed herein, except that the opinion of the Court of Appeals is reported in 418 Fed. 2d 705.

JURISDICTION.

The petitioner has correctly stated the steps for invoking the jurisdiction of the Supreme Court.

QUESTION PRESENTED.

Respondent restates the "Question Presented" because statement of the question in the Petition reflects Petitioner's misunderstanding of the principle involved in this case.

Is a perfected security interest to secure payment of an obligation extinguished by operation of law when, on the due date of the note which is evidence of the obligation, a partial payment of the obligation is accepted and a renewal note is executed which is evidence of the balance due on the obligation?

STATUTE INVOLVED.

Petitioner's statement of the statute involved is accepted.

STATEMENT OF CASE.

Petitioner's statement of the case is acceptable except that in the last paragraph thereof at the top of page 5 of the Petition the statement of the basis of the decision of the Sixth Circuit Court of Appeals in reversing the decision of the United States District Court for the Eastern District of Kentucky is incomplete.

Inasmuch as the Opinion is printed in full in Appendix A to the Petition, and inasmuch as the Opinion is discussed at some length under the heading "Reasons for Granting Writ" it does not appear necessary to set out the basis of the decision in greater detail.

ARGUMENT.

The Decision of the Sixth Circuit, Review of Which Is Sought by the Petition, Does Not Conflict With Berman, Decided by the First Circuit.

In the Petition for Writ of Certiorari under title "Reasons for Granting Writ," point 1 is stated as follows:

> "The Decision Below Conflicts in Principal (sic) With the Decision in the First Circuit Court of Appeals as to the Proper Application of Article 9-204(5) of the Uniform Commercial Code."

This heading and comments thereunder reflect the continuing failure of Counsel for Petitioner to understand the Court's decision in Safe Deposit Bank and Trust Company v. Berman, 393 F. 2d 401 (First Cir. 1968), and the opinion of the Sixth Circuit Court of Appeals reprinted in Appendix A to the Petition.

As is demonstrated by the manner in which the question is presented in the Petition, the concept of Petitioner's Counsel of a security transaction is that the note involved is the thing secured rather than the indebtedness. Being unable to accept the obvious "hornbook law" that a chattel mortgage secures the debt not the evidence of it, Petitioner can never hope to understand what the Circuit Court has held in its Opinion (see Opinion and Judgment of Court of Appeals, Appendix A to Petition for Writ of Certiorari, page 11).

The Sixth Circuit is accused of "avoiding" Berman, *supra,* "* * * by stating it was inapposite, because there had been additional loans made in Berman, *supra,* and not in Cantrill" (Petition, page 5). Yet, in the next sentence Petitioner "grants" that the Sixth Circuit has correctly distinguished Berman on its facts, but says that it has nothing to do with the application of the principal (sic) laid down in Berman. Without explaining why it is true, the Petition contains the bald statement:

> "In light of Berman, and the principal (sic) of law therein established, it is not possible to reconcile the two cases" (Petition, page 6).

There Is No Issue of National Importance.

Under point 2 entitled "Overall National Importance of Issue" the confusion compounds beyond reason. Counsel for Petitioner would have the Court believe that all of the lending institutions in the United States, and legal counsel for these institutions, are confused and searching for the answer to the puzzling question of what to put in a security agreement which will protect the institution when the obligation matures and the debtor cannot pay.

It is apparent that only Counsel for Petitioner is confused, and this confusion results directly from failure to properly analyze either Berman, *supra,* or the Opinion of the Sixth Circuit, a review of which is sought by this Petition.

Beginning with the last grammatical paragraph, on page 6 of the Petition, Petitioner analyzes this Opinion of the Sixth Circuit:

> "The Sixth Circuit held in essence, that even when a new note is taken, with an increase in interest, this does not create a new obligation, and as such is not 'other value.' "

In respect to this point, what the Sixth Circuit held is best stated by the Opinion itself. At page 12 of Appendix A, beginning with the second grammatical paragraph the Court said:

> "Turning to the note, it is clear that the parties to the transaction did not intend that the new note was to extinguish the original obligation for the note specifically recites that it is 'Renewal No. 1 Orig. Amt. $30,310.00.' It also recites the date of the original loan and refers to the collateral for that loan. It is difficult to imagine a clearer case than this. The parties' intention was only to extend the time for payment not to extinguish the obligation.
>
> "The fact that the interest rate was raised from 6% to 7% does not negate this conclusion. See Amlung v. First Nat'l Bank of Louisville, 411 S. W. 2d 465, 467 (Ky., 1967). Commercial certainly did not intend to give up its security. See State Nat'l Bank of Frankfort v. Thompson, 277 Ky. 527, 530 (1938). The Trustee in Bankruptcy can hardly claim there was a novation because he has stipulated:
>
> " '(4) On the 8th day of August, 1967 a payment was made on the original note and a renewal

note was executed by Cantrill Construction Company to the Commercial Bank in the amount of Twenty Thousand Two Hundred Two Dollars ($20,202.00) bearing interest at the rate of seven (7) per cent per annum. There is a balance due from the Bankrupt on account of the above described transaction in the amount of Twenty Thousand Two Hundred Two Dollars ($20,202.00) with interest at seven (7) percent from the 8th day of August, 1967.'

"Since there was no novation, the original obligation remains in full force."

Of all misinterpretations regarding what the Sixth Circuit held in its Opinion, the most obvious is found in the following sentence beginning at the bottom of page 6 of the Petition:

"* * * The Sixth Circuit also held that security agreements did not need to provide for extensions or renewals of pre-existing obligations, and that a security agreement, limited to the note it is given to secure the repayment of, may be extended to subsequent notes by incorporation by reference in the subsequent notes."

Using this platform, constructed upon this misinterpretation of what the Sixth Circuit Opinion held, the sentence following asks the rhetorical question:

"* * * This case simply asks—what is 'other value,' and if Berman is correct . . . and the Sixth Circuit was correct, then how does one advise a client on how he is to secure his loans against future defaults, or renewals or extensions. * * *"

Having constructed a false platform from which to launch this question, Counsel for Petitioner ignores the question but strings together some unrelated sentences meaning nothing.

What the Sixth Circuit did hold in respect to extensions or renewals, and "other value" is found in the last grammatical paragraph on page 15 of Appendix A to the Petition:

> "In the present case there was no 'future advance' as in Berman. No new money was loaned to Cantrill. All that was done was to renew the evidence of the old indebtedness and extend the time of payment. If Berman is to apply, the renewal note would have to come within the concept of 'other value' of § 355.9-204 (5). Had the new note been taken in payment and satisfaction of the indebtedness, then arguably there would have been 'other value.' In other words, a *new obligation* would have been created, just as a distinct obligation was created in Berman by the future advances. Section 355-9-204(5) allows security agreements to cover these future, distinct obligations so long as they are specifically set forth in the agreement. However, as we have discussed, there was no novation in this case. There was, therefore, no new obligation required by § 355.9-204(5) to be set forth in the security agreement. The original obligation remained in full force, and was, of course, covered by the security agreement. It was not necessary for the security agreement to provide for an extension or renewal of the indebtedness."

Thus, since the Berman case, *supra,* in which future advances were made, relates to a security agreement which failed to provide for "future advances," since

there is no requirement that "extensions or renewals" of an obligation be included in a security agreement, and since the Opinion of the Sixth Circuit as quoted in the preceding paragraph clearly explains why the phrase "other value" does not apply to this transaction there is no uncertainty and doubt connected with transactions of this nature which need to be resolved.

Quite the contrary, if it should be determined that, a security transaction which is as clear, uncomplicated and technically correct as this one, is to be declared void on the basis suggested by Counsel for Petitioner, confusion and uncertainty truly would reign supreme in commercial and legal circles.

It has been most difficult to respond to this Petition because no logical argument is advanced to support Petitioner's position. The easiest way for the Court to clearly understand this case is to read the Opinion of the Sixth Circuit and compare it with the Berman case. When this is done there will be no doubt the Petition should be denied.

CONCLUSION.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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